

December 11, 2002

***NOTICE OF EX PARTE
PRESENTATION***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW B204
Washington, DC 20554

**Re: Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;
Implementation of the Local Competition Provisions of the Telecommunications
Act of 1996; Deployment of Wireline Services Offering Advanced
Telecommunications Capability
CC Docket Nos. 01-338, 96-98 and 98-147**

Dear Ms. Dortch:

The attached written *Ex Parte* Presentation concerning the above-referenced proceeding was sent to the Honorable Michael K. Powell, the Honorable Kathleen Q. Abernathy, the Honorable Michael Copps, the Honorable Kevin Martin and the Honorable Jonathan Adelstein by Walter B. McCormick, Jr., President and CEO of the United States Telecom Association (USTA). In accordance with FCC Rule 1.1206(b)(1)¹, this Notice of *Ex Parte* Presentation and a copy of the referenced *Ex Parte* Presentation are being filed with you electronically for inclusion in the public record. Should you have any questions, please contact me at (202) 326-7300.

Sincerely,

/s/_____
Lawrence E. Sarjeant
Vice President Law &
General Counsel

cc: Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Christopher Libertelli
Lisa Zaina
William Maher

¹ 47 C.F.R. § 1.1206(b)(1).



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Walter B. McCormick, Jr.
President and Chief Executive Officer

December 11, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 – 12th Street, SW, Room 8 B201
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 – 12th Street, SW, Room 8 B115
Washington, D.C. 20554

The Honorable Michael Copps
Commissioner
Federal Communications Commission
445 – 12th Street, SW, Room 8 A302
Washington, D.C. 20554

The Honorable Kevin Martin
Commissioner
Federal Communications Commission
445 – 12th Street, SW, Room 8 A204
Washington, D.C. 20554

The Honorable Jonathan Adelstein
Commissioner
Federal Communications Commission
445 – 12th Street, SW, Room 8 C302
Washington, D.C. 20554

***EX PARTE* PRESENTATION**
(submitted electronically)

**Re: Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;
Implementation of the Local Competition Provisions of the Telecommunications
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Dear Commissioners:

Over the past months, there have been numerous *ex parte* meetings and filings concerning the issues under consideration in the above-referenced proceeding, generally referred

to as the *Triennial Review*. In particular, much attention has been focused on UNE-P, hot cuts and the role of state regulators in determining the network elements that incumbent local exchange carriers (ILECs) must unbundle pursuant to Section 251(c)(3)² of the Telecommunications Act of 1996 ('96 Act). I write today to share with you the views of the United States Telecom Association (USTA) on these critically important issues. Your decisions in this proceeding will dramatically affect ILEC investment incentives.

Recent *ex parte* presentations by the Telecommunications Industry Association (TIA) demonstrate that continuing decreases in capital spending in the telecommunications industry are having a severe negative impact on consumers, carriers and suppliers of telecommunications equipment.³ Today, we stand at a precipice. Decisions by the Federal Communications Commission (FCC) that produce further disincentives for telecommunications infrastructure investment will send this industry, as well as the supplier industry, into an abyss from which it will take decades to recover. The decisions that you make in the *Triennial Review* proceeding will determine whether, or how quickly, the Nation realizes the Congressional mandate that the FCC and State commissions "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . ."⁴ Only by demonstrating a commitment to free market values by taking a deregulatory approach in proceedings such as the *Triennial Review* will you and your colleagues in the states promote conditions that will allow the telecommunications industry to reverse its downward investment trend. The elimination of UNE-P is an essential step in returning this industry to economic health.

USTA is on record as supporting the removal of switching as a UNE.⁵ The market for switches is highly competitive, and switches are readily available to competitive carriers. Today, there are approximately 1300 competitive local exchange carrier (CLEC) voice switches in service.⁶ This fact clearly demonstrates that CLECs are not impaired in their ability to provide local exchange and exchange access services without switching from ILECs as an unbundled element. CLECs do not need to rely on ILECs for switching as a UNE. Nonetheless, some ILECs have expressed an interest in providing facilities on a wholesale basis at non-TELRIC rates.⁷ CLECs no longer seriously dispute the availability of switching from non-ILEC sources. Rather, they now focus their impairment argument on their ability to have retail customer loops

² 47 U.S.C. § 251(c)(3).

³ See letter to the Honorable Michael K. Powell, November 25, 2002, from Matthew J. Flanigan, President, TIA.

⁴ See 47 U.S.C. § 706.

⁵ See Comments of the United States Telecom Association filed herein on April 5, 2002, at 7.

⁶ *The State of Local Competition 2002*, Association for Local Telecommunications Services Annual Report (April 2002), at 8, reporting 1244 CLEC voice switches and 9,524 CLEC data switches as of 09/30/01.

⁷ See letter to FCC Secretary Marlene H. Dortch, 11/19/02, from Jay Bennett, Executive Director Federal Regulatory, SBC, attachment.

connected to CLEC switches or the switches of third party switch providers.⁸ This has resulted in questions being raised about the ability of ILECs to convert large numbers of loops from ILEC switches to CLEC switches through the “hot cut” process.

USTA ILEC members are able to perform hot cuts in volumes and timeframes that, in the context of their particular circumstances, support the finding that the removal of switching from the UNE list will not impair the ability of CLECs to provide local exchange and exchange access services. It is essential, though, that any conclusions reached by the FCC concerning the adequacy of ILEC hot cuts, in the absence of switching as a UNE, reflect realistic expectations concerning the number of loops that an ILEC may be required to convert to CLEC switches during a specified time period. For example, Verizon Communications (Verizon) and SBC described their hot cut processes and performance in recent *ex parte* presentations.⁹ These presentations demonstrate that they have processes in place that render them capable of accommodating CLEC conversion requests, at volumes that can realistically be expected, in a timely and high quality manner. Accordingly, CLECs would not be impaired in their ability to provide local exchange or exchange access services in Verizon or SBC local service areas if switching is removed from the UNE list.

It would be unreasonable, though, to expect an ILEC with a fraction of the number of local loops as Verizon or SBC to have similar conversion processes in place or be capable of loop conversions in volumes equal to that of Verizon or SBC. Any measure considered to assess the adequacy of ILEC loop conversions must recognize the broad differences in demand that will be experienced by ILECs.¹⁰ A point that is equally applicable to large, mid-size and small ILECs is that any loop conversion conclusions applied to an ILEC must be based on sensible, real world projections and not on theoretical or exaggerated loop conversion volumes.

⁸ See letter to Chairman Michael K. Powell and Commissioners Abernathy, Copps and Martin, November 13, 2002, from James W. Cicconi, General Counsel and Executive Vice President Law & Government Affairs, AT&T, at 21-23. “In order for a competitor to connect an unbundled ILEC voice grade loop to its switch, the CLEC faces two different categories of significant impairment that the incumbent does not. These disadvantages constitute substantial barriers to their ability to enter the market through the use of unbundled loops and non-ILEC switches.” (p.22).

⁹ See letter to FCC Secretary Marlene H. Dortch, November 20, 2002, from W. Scott Randolph, Director – Regulatory Affairs, Verizon Communications, attachment. See also letter to FCC Secretary Marlene H. Dortch, October 11, 2002, from Brian J. Benison, Associate Director Federal Regulatory, SBC, and the Declaration of John Berringer and David R. Smith, executed on July 17, 2002, and filed as Attachment B to SBC’s July 17th Reply Comments herein.

¹⁰ Even rural ILECs that are exempt from the Section 251(c)(3) unbundling requirement have an interest in ensuring that the FCC not adopt hot cut standards that ignore the limited number of loops they would be asked to convert. Individual rural ILECs could lose their rural exemption in the future and any loop conversion standards adopted in this proceeding may then apply to them.

Finally, USTA strongly disagrees with those parties that argue for the transfer of decision-making authority from the FCC to State commissions concerning the network elements that ILECs will be required to unbundle. It would be an unlawful delegation of authority for the FCC to permit State commissions to require ILEC provisioning of network elements that the FCC has determined do not meet the Section 251(d)(2)¹¹ impairment standard. USTA agrees with the position taken by the former Regional Bell Operating Companies (RBOCs) in their joint *ex parte* presentation that when the Commission applies section 251(d)(2) to keep a network element off the UNE list, it necessarily decides that inclusion of that UNE on the list by a State commission would upset the delicate balance provided for in the '96 Act. As the Supreme Court concluded in *AT&T v. Iowa*: "Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. **It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements.**"¹² Unlike setting rates for network elements, State commissions have no role under Sections 251(c)(3) and 251(d)(2) to determine which network elements go on the UNE list or are taken off the UNE list. The FCC cannot abdicate its responsibility to establish or apply a limiting standard to ILEC UNEs by allowing State commissions the authority to second guess its judgments. Despite the protests of CLECs and entreaties of State commissions, the FCC may not "permit the states to add UNEs to the unbundling list simply because they, rather than the Commission, wish to follow the judicially repudiated theory that 'more unbundling is better.'"¹³ FCC decisions to remove network elements from the UNE list must be preemptive of conflicting State commission actions.

On the basis of the foregoing, USTA urges the FCC to remove switching from the list of unbundled elements to be made available by ILECs pursuant to Section 251(c)(3). Further, the

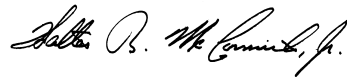
¹¹ 47 U.S.C. § 251(d)(2).

¹² *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 391-392 (1999) (emphasis added).

¹³ Joint RBOC letter to Chairman Michael K. Powell, November 19, 2002, from Herschel L. Abbott, Jr., BellSouth; R. Steven Davis, Qwest; Paul Mancini, SBC; and Susanne Guyer, Verizon, at 4, citing to *USTA v. FCC*, 290 F.3d 415, 425 (2002).

decision to remove switching from the UNE list should be made nationally and be preemptive of State commission efforts to re-impose the obligation to provide unbundled switching on any ILEC.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter B. McCormick, Jr.", written in a cursive style.

Walter B. McCormick, Jr.

cc: Matthew Brill
Eric Einhorn
Jordan Goldstein
Daniel Gonzalez
Christopher Libertelli
Lisa Zaina
William Maher